Supreme Court, U.S.
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No. 01 762

In the Supreme Court of the United States

OCTOBER TERM, 2001

LAZARO GALLEGO and FELIX GALLEGO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER CERTIORARI REVIEW SHOULD BE GRANTED TO RESOLVE THE CIRCUIT CONFLICT OVER THE FOLLOWING ISSUE:

> **WHERE THE SOURCE OF PLAIN ERROR IS A SUPERVENING DECISION, HERE, *APPRENDI v. NEW JERSEY,* 530 U.S. 46 (2000), WHICH ALTERS SETTLED LAW, SHOULD THE BURDEN OF PERSUASION BE BORNE BY THE GOVERNMENT OR THE DEFENDANT?**

II.

WHETHER CERTIORARI REVIEW SHOULD BE GRANTED TO RESOLVE THE CIRCUIT CONFLICT OVER THE FOLLOWING ISSUE:

> **WHERE A DEFENDANT'S SENTENCE VIOLATES THE RULE OF *APPRENDI* BY EXCEEDING THE STATUTORY MAXIMUM SENTENCE AUTHORIZED BY THE JURY VERDICT, IN DECIDING WHETHER THE *APPRENDI* VIOLATION AFFECTS THE DEFENDANT'S SUBSTANTIAL RIGHTS FOR PURPOSES OF PLAIN-ERROR REVIEW, SHOULD THE REVIEWING COURT FIND AN EFFECT UPON SUBSTANTIAL RIGHTS SOLELY BECAUSE AN INCREASED SENTENCE WAS IMPOSED UPON THE DEFENDANT, OR DOES THE SUBSTANTIAL**

RIGHTS ISSUE REQUIRE AN INQUIRY INTO THE EVIDENCE PRESENTED AT TRIAL AND WHETHER THE DEFENDANT CONTESTED THE DRUG QUANTITY CLAIMED BY THE GOVERNMENT?

III.

WHETHER THE RULE OF *APPRENDI* APPLIES TO A SENTENCE WHICH, ALTHOUGH WITHIN THE MAXIMUM TERM OF IMPRISONMENT AUTHORIZED BY STATUTE, EXCEEDS THE MAXIMUM TERM OF IMPRISONMENT AUTHORIZED BY THE UNITED STATES SENTENCING GUIDELINES?

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CITATION OF THE OPINION BELOW

The opinion of the court of appeals is reproduced in the Appendix filed herewith and is reported as *United States v. Gallego*, 247 F.3d 1191 (11th Cir.2001). A copy of the opinion is attached to this petition in the Appendix as App. 1-20. The Eleventh Circuit denied rehearing on August 3, 2001. A copy of the order of denial is attached to the petition as App. 21-22.

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment sought to be reviewed is the decision of the United States Court of Appeals for the Eleventh Circuit which is reported as *United States v. Gallego*, 247 F.3d 1191 (11th Cir.2001) (App. 1-20). The decision was filed on April 13, 2001. A timely filed petition for rehearing and rehearing en banc was denied on August 3, 2001. (App. 21-22). A timely filed application for extension of time within which to file this petition for writ of certiorari was granted to December 10, 2001.

The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment in question is 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 841 appears in its entirety in the Appendix. The subsections of the statute involved in this petition are as follows:

21 U.S.C. § 841(a) provides, in pertinent part, that "it shall be unlawful for any person knowingly or intentionally ... to ... possess with intent to ... distribute ... a controlled substance...";

21 U.S.C. § 841(a) prohibits, in pertinent part, possession with intent to distribute a controlled substance;

21 U.S.C. § 841(b)(1)(A) provides a penalty of ten years to life imprisonment for possession of at least 5 kilograms of cocaine;

21 U.S.C. § 841(b)(1)(B) provides a penalty of five to

forty years' imprisonment for possession of at least 500 grams, but less than 5 kilograms, of cocaine; and

21 U.S.C. § 841(b)(1)(C) provides a penalty of imprisonment of not more than twenty years to possession of cocaine with no mention of quantity.

STATEMENT OF THE CASE

On May 31, 1996, an indictment charged the petitioners, Lazaro Gallego [Lazaro] and Felix Gallego [Felix], with various drug-related offenses. Following a jury trial, the petitioners were convicted and sentenced. While their appeal was pending in the Eleventh Circuit, this Court decided *Apprendi v. New Jersey*, 530 U.S. 46, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) which held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The Eleventh Circuit granted the petitioners leave to challenge their sentences as violative of *Apprendi*.

The petitioners alleged on appeal that in violation of *Apprendi*, drug quantities that were neither pled in the indictment or submitted to the jury were employed at sentencing by the district judge to increase their sentences beyond the maximum terms of imprisonment prescribed by the jury verdicts. At the time of the petitioners' sentencing proceedings, the law of the Eleventh Circuit was contrary to the *Apprendi* claim. See *United States v. Hester*, 199 F.3d 1287, 1291 (11th Cir.2000) (amount of drugs not element of offense); *United States v. Perez*, 960 F.2d 1569, 1574 (11th Cir.1992) (indictment need not allege drug quantity for enhanced sentence to apply). Thus, the petitioners' *Apprendi*

claims were not preserved for review. Accordingly, the Eleventh Circuit applied a plain-error analysis.

Relying upon *Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997), as well as Fed.R.Crim.P. 52(b)[1], the Eleventh Circuit analyzed each petitioner's *Apprendi* claim by applying "[t]he four prongs of plain error review [which] are: (1) there must be error; (2) the error must be plain; (3) the error must affect the appellant's substantial rights; and (4) the error must 'seriously affect[] the fairness, integrity, or public reputation of judicial proceedings.'" *Gallego*, 247 F.3d at 1196 (quoting *Johnson*, 520 U.S. at 467).

The Eleventh Circuit found that each petitioner's sentence violated *Apprendi* and that the petitioners satisfied the first two prongs of plain error review. *Gallego*, 247 F.3d at 1198-99. Nevertheless, the Eleventh Circuit affirmed solely upon the ground that each petitioner was "unable to carry his burden of demonstrating that the error affected his substantial rights." *Id.*

As to Lazaro, the court reasoned as follows. Lazaro was subject to a maximum term of life imprisonment for possession of five kilograms or more of cocaine pursuant to 21 U.S.C. § 841(b)(1)(A). Without a finding of quantity, the maximum term of imprisonment was twenty years pursuant to 21 U.S.C. § 841(b)(1)(C). The jury, according to the Eleventh Circuit, in finding Lazaro guilty of possession of cocaine, "must have found at least five kilograms" because of "undisputed testimony that 326 kilograms of cocaine were

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[1] Rule 52(b), entitled "Plain Error", provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

involved ...". *Gallego*, 247 F.3d at 1199. Even though the Eleventh Circuit recognized that "Lazaro did object to the attribution of 326 kilograms to him", the court nevertheless treated the attribution as "undisputed" because Lazaro, rather than "offer any contrary testimony on quantity", instead objected based upon the "unreliability of the witnesses who testified as to drug quantity" and based upon "alibi testimony". *Id.* at n.15. Thus, the Eleventh Circuit concluded, Lazaro's substantial rights were not affected by a sentence of life imprisonment because the "undisputed" evidence showed a drug quantity in excess of five kilograms of cocaine, even though no such quantity was pled or submitted to the jury.

As to Felix, the Eleventh Circuit found that he also failed to satisfy the third prong of plain error review. *Gallego*, 247 F.3d at 1198. The Eleventh Circuit concluded that a minimum quantity of four kilograms of cocaine was not in controversy because after the jury verdict, Felix admitted in an objection to his presentence investigation report that he personally possessed four kilograms of cocaine during an offense. Four kilograms of cocaine exceeds the 500-gram threshold amount necessary for sentencing under 21 U.S.C. § 841(b)(1)(B), which prescribes a range of five to forty years' imprisonment. The Eleventh Circuit concluded that because Felix's sentence of 324 months' imprisonment was less than forty years, the sentence did not violate his substantial rights, *id.*, even though the drug quantity was not pled or submitted to the jury.

ARGUMENTS AND AUTHORITIES

I.

THIS COURT IS REQUESTED TO RESOLVE THE CIRCUIT CONFLICT OVER THE FOLLOWING ISSUE:

> **WHERE THE SOURCE OF PLAIN ERROR IS A SUPERVENING DECISION, HERE, *APPRENDI v. NEW JERSEY,* 530 U.S. 46 (2000), WHICH ALTERS SETTLED LAW, SHOULD THE BURDEN OF PERSUASION BE BORNE BY THE GOVERNMENT OR THE DEFENDANT?**

In *United States v. Viola*, 35 F.3d 37, 42 (2d Cir.1994), cert. denied, 513 U.S. 1198, 115 S.Ct. 1270, 131 L.Ed.2d 148 (1995), the Second Circuit held that "when a supervening decision alters settled law, ... the burden of persuasion as to prejudice (or, more precisely, lack of prejudice) is borne by the government, and not the defendant." The Second Circuit opined that the burden should be upon the government for the following reasons:

> In the ordinary case, an event, such as the issuance of a jury instruction, occurs which is clear error under the law at the time of trial. Because the law is clear, the defendant is on notice of the duty to object. If he fails to object, he not only forfeits his legal right to have the error corrected, but he impedes the judicial process by failing to prompt the trial judge to make timely correction of the error. It is proper to hold a defendant accountable for that failure, and to deter defendants from strategically withholding an objection

> in order to seek reversal on appeal. The defendant rightly bears the burden of proving prejudice in the ordinary case.
>
> The situation is different when a supervening decision alters settled law. A defendant clearly has no duty to object to a jury instruction that is based on firmly established circuit authority. He cannot be said to have "forfeited a right" by not making an objection, since at the time of trial no legal right existed. If we were to penalize defendants for failing to challenge entrenched precedent, we would be insisting upon an omniscience on the part of defendants about the course of the law that we do not have as judges. Imposing such a duty would only encourage frivolous objections and appeals. When the source of plain error is a supervening decision, the defendant has not been derelict in failing to object at trial, and there is thus no cause to shift the burden of proving prejudice to the defendant. In this special context, as in harmless error review under Rule 52(a), the government must show that the error did not affect the defendant's substantial rights.

Viola, 35 F.3d at 42.

In the case at bar, the source of plain error was this Court's supervening decision in *Apprendi*. At the time of the petitioners' sentencing proceedings, the applicable law in the Eleventh Circuit was precisely to the contrary of *Apprendi*. See *United States v. Hester*, 199 F.3d at 1291 (amount of drugs not element of offense); *United States v. Perez*, 960 F.2d at 1574 (indictment need not allege drug quantity for enhanced sentence to apply). In conflict with the Second Circuit's ruling in *Viola*, the Eleventh Circuit placed the

burden upon the petitioners by rejecting their challenges to their sentences as violative of *Apprendi* solely upon the ground that each petitioner was "unable to carry his burden of demonstrating that the error affected his substantial rights." *Gallego*, 247 F.3d at 1198-99.

Certiorari review is respectfully requested to resolve the conflict, which has taken on added significance throughout the circuits since the announcement of this Court's circuit-precedent-shattering decision in *Apprendi*.[2]

II.

THIS COURT IS REQUESTED TO RESOLVE THE CIRCUIT CONFLICT OVER THE FOLLOWING ISSUE:

> **WHERE A DEFENDANT'S SENTENCE ON DRUG CHARGES INVOLVING SPECIFIC DRUG QUANTITIES VIOLATES THE RULE OF *APPRENDI* BY EXCEEDING THE STATUTORY MAXIMUM SENTENCE AUTHORIZED BY THE JURY VERDICT, IN DECIDING WHETHER THE *APPRENDI* VIOLATION AFFECTS THE DEFENDANT'S SUBSTANTIAL RIGHTS FOR PURPOSES OF PLAIN-ERROR REVIEW, SHOULD THE REVIEWING COURT FIND AN**

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[2] From July 18, 2000 through October 17, 2001, there have been 260 decisions from the courts of appeals addressing *Apprendi* and plain error. (Source: search of decisions of United States Courts of Appeals containing "*Apprendi*" within the same paragraph as "plain error.") The number of decisions continually increases.

EFFECT UPON SUBSTANTIAL RIGHTS SOLELY BECAUSE AN INCREASED SENTENCE WAS IMPOSED UPON THE DEFENDANT, OR DOES THE SUBSTANTIAL RIGHTS ISSUE REQUIRE AN INQUIRY INTO THE EVIDENCE PRESENTED AT TRIAL AND WHETHER THE DEFENDANT CONTESTED THE DRUG QUANTITY CLAIMED BY THE GOVERNMENT?

The circuits are divided into two conflicting camps in evaluating whether the failure to submit a drug quantity determination to the jury in violation of *Apprendi* affects a defendant's substantial rights for purposes of plain-error analysis. In the first camp, an effect upon substantial rights is found whenever the defendant's sentence was increased beyond the statutory maximum based upon the drug quantity claimed by the government but never submitted to the jury. See, *e.g.*, *United States v. Buckland*, 259 F.3d 1157 (9th Cir.2001), rehearing en banc granted ___ F.3d ___ (9th Cir. September 14, 2001);*United States v. Randle*, 259 F.3d 319 (5th Cir.2001); *United States v. Promise*, 255 F.3d 150 (4th Cir.2001) (en banc). Arguably, this approach finds support in this Court's ruling in *Glover v. United States*, 531 U.S. 198, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001) which held that an increase in a defendant's sentence resulting from ineffective assistance of counsel was prejudicial.

In the second camp, the substantial rights issue requires an inquiry into the evidence presented at trial and the extent to which a defendant contested the drug quantity claimed by the government. See, *e.g.*, *United States v. Vazquez*, ___ F.3d ___, 2001 WL 1188250 (3d Cir. October 9, 2001) (en banc); *United States v. Anderson*, 236 F.3d 427 (8th Cir.2001). Arguably, this approach finds support in

Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) which held that the defendant's substantial rights were not affected by a failure to submit an offense element to the jury where the overwhelming evidence presented at the trial established the missing element.

In the case at bar, the Eleventh Circuit aligned itself with the second camp. The Eleventh Circuit acknowledged that the petitioners' sentences, which were based upon specific drug quantities, violated *Apprendi* as exceeding the statutory maximum sentences authorized by the jury verdicts because no drug quantities were pled or submitted to the jury. However, in reviewing the *Apprendi* violation for plain error, the Eleventh Circuit affirmed the sentences solely upon the ground that the substantial rights of the petitioners were not affected.

In the case of Felix, the court relied upon an admission in an objection to a presentence investigation report that Felix possessed a threshold drug amount.

In the case of Lazaro, the Eleventh Circuit found that evidence adduced at trial satisfied the threshold drug quantity for an aggravated drug offense. In addition, the court reasoned that "[b]ecause the jury must have found at least five kilograms on Count Sixteen, Lazaro's substantial rights were not affected by a sentence of life imprisonment on Count Sixteen, pursuant to section 841(b)(1)(A)." *Gallego*, at 1199.

The Fifth Circuit in *Randle* reached an opposite conclusion. In *Randle*, the defendant's sentence exceeded the statutory maximum based upon the sentencing judge's fact findings concerning drug quantity. The defendant raised the *Apprendi* violation for the first time on appeal. The Fifth Circuit reversed and remanded for resentencing despite its express finding "that no reasonable jury could have found Randle responsible for less than 1.5 kilos of crack", the threshold amount in question. The Fifth Circuit reasoned:

"Notwithstanding our belief that no reasonable jury could have found Randle responsible for less than 1.5 kilos of crack, the fact is, they did not so find and were not even inferentially asked to make any such finding." *Id.* at 322.

Certiorari review is sought because the conflict among the circuits, which results in a gross disparity in the treatment of identically situated defendants, will continue until there is a resolution by this Court.

III.

THE RULE OF *APPRENDI* APPLIES TO A SENTENCE WHICH, ALTHOUGH WITHIN THE MAXIMUM TERM OF IMPRISONMENT AUTHORIZED BY STATUTE, EXCEEDS THE MAXIMUM TERM OF IMPRISONMENT AUTHORIZED BY THE UNITED STATES SENTENCING GUIDELINES.

A.

Felix claimed on appeal that his sentence of imprisonment for 324 months was imposed in violation of *Apprendi* because the district court rather than the jury determined the quantity of drugs involved. The Eleventh Circuit found that Felix met the first two prongs of plain error review because his sentence exceeded the maximum of twenty years' imprisonment prescribed by 21 U.S.C. §841(b)(1)(C) and the error was plain. *Gallego*, 247 F.3d at 1198. But the court found that Felix failed to satisfy the third prong because he could not meet his burden of showing that the error affected his substantial rights. The Eleventh Circuit found that after the jury verdict, Felix admitted in his objection to the presentence investigation report and at sentencing that he personally possessed four kilograms of cocaine. Based thereon, the Eleventh Circuit concluded:

> Therefore, a minimum quantity of four kilograms was not in controversy. Four kilograms of cocaine exceeds the threshold amount necessary for sentencing under 21 U.S.C. § 841(b)(1)(B), which requires a finding of at least 500 grams of cocaine. Because section 841(b)(1)(B) prescribes a sentencing range of five to forty years' imprisonment, and because Felix's sentence of 324 months' imprisonment is less than forty years, we find that Felix's substantial rights were not violated by the error in his sentencing.

Id.

B.

Felix should have been sentenced based upon a four-kilogram attribution. Pursuant to the Sentencing Guidelines, the sentencing range for four kilograms for Felix would be based upon a base offense level of 30 which translates to a term of imprisonment ranging from 97 months to 121 months. See 18 U.S.C., United States Sentencing Guidelines, Chapter Five, Part A. Certiorari review is sought to determine whether the sentence imposed in excess of 121 months, and affirmed by the Eleventh Circuit, violates the rule of *Apprendi*.

C.

Although *Apprendi* concerned judge-found fact that increased the defendant's statutory maximum sentence, the same constitutional concerns at issue in that case are present in this one for two reasons: first, Felix's legally prescribed punishment under the Sentencing Guidelines was substantially increased based solely upon judge-found facts; and second, the sentence imposed exceeded the maximum prescribed by the Guidelines.

A "scheme that keeps from the jury facts that 'expos[e] [defendants] to greater or additional punishment,' may raise serious constitutional concerns." *Apprendi*, 120 S.Ct. at 2360 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88, 106 S. Ct. 2411, 2417 (1986)). It is true that this Court in *Apprendi* expressly declined to decide whether the due process concerns at issue there applied to cases involving the Sentencing Guidelines. See *Apprendi*, 120 S.Ct. at 2366 n.21. However, in the lead opinion, Justice Stevens stated that it "'is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" 120 S.Ct. at 2363 (quoting *Jones v. United States*, 526 U.S. 227, 252, 119 S.Ct. 1215, 1228 (1999) (Stevens, J., concurring)). Consistent therewith, the four dissenting justices noted the following:

> The actual principle underlying the Court's decision may be that any fact (other than prior conviction) that has the effect, in real terms, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt. . . The principle thus would apply not only to schemes like New Jersey's, under which a factual determination exposes the defendant to a sentence beyond the prescribed statutory maximum, but also to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (*e.g.*, the Federal Sentencing Guidelines).

Apprendi, 120 S.Ct. at 2391 (O'Connor, J., with whom Rehnquist, C.J., and Kennedy and Breyer, JJ., join, dissenting) (emphasis added). Similarly, one member of the majority suggested that the reasoning of *Apprendi* could extend to fact-finding for purposes of the Sentencing Guidelines:

> It is likewise unnecessary to consider whether (and, if so, how) the rule regarding elements applies to the Sentencing Guidelines, given the unique status that they have under *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). But it may be that this special status is irrelevant, because the Guidelines "have the force and effect of laws." *Id.*, at 413 (Scalia, J., dissenting).

Id. at 2380 n.11 (Thomas, J., concurring).

As applied in this case, the Sentencing Guidelines, like the hate-crime statute in *Apprendi*, authorize increased punishment based on the existence of certain facts -- here, drug quantity -- that were neither found by a jury nor proven beyond a reasonable doubt. These facts, moreover, so greatly increased the punishment that Felix faced that they are "appropriately characterized as 'a tail which wags the dog of the substantive offense.'" *Apprendi*, 120 S.Ct. at 2365 (quoting *McMillan*, 477 U.S. at 88, 106 S.Ct. at 2417). By relying upon *Jones* for the constitutional rule announced in *Apprendi*, Justice Stevens necessarily extended the application of *Apprendi* to cases such as Felix's. Indeed, the sentence in *Jones* was struck down even though it did not exceed the prescribed statutory maximum. The required allegations, proof, and findings by the jury are not limited to those that increase penalties beyond the so-called statutory maximum. Rather, the fact removed from jury consideration need only

increase the prescribed range of penalties to which the accused is exposed.

Because *Apprendi* requires that "all facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by a jury," *Apprendi*, 120 S.Ct. at 2367 (Scalia, J., concurring), and because the punishment to which Felix eventually became subject was based upon facts regarding drug quantity that were not found by a jury, his sentence must be vacated. Due process and the constitutional right to trial by jury demand that facts that substantially increase the "legally prescribed punishment" be found by a jury and established beyond a reasonable doubt.

The constitutional rationale of *Apprendi* should apply to the Guidelines because, as Justice Thomas noted, they "have the force and effect of laws." 120 S.Ct. at 2380 n.11 (quoting from Justice Scalia's dissent in *Mistretta*, 488 U.S. at 413). Because Congress has mandated that the courts "shall impose" sentences within guideline ranges (unless there are grounds for upward departure), see 18 U.S.C. § 3553(b), the upper end of each of those ranges is, in effect, a statutory maximum. Under *Apprendi*, any fact which increases this statutory maximum must be charged in the indictment, presented to the jury, and proved beyond a reasonable doubt. Under this reasoning, any facts offered by the government to justify an upward departure must be alleged and proved. Because the guideline range itself establishes a "statutory maximum", then any fact which causes that range to be higher must also be charged in the indictment, proved, and found by the jury. Thus, the sentence imposed upon Felix exceeds that "statutory maximum" of 121 months and thereby violates the express constitutional rationale of *Apprendi*.

APPENDIX

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APP.

DECISION SOUGHT TO BE REVIEWED 1-20

ORDER DENYING REHEARING 21-22

21 U.S.C. § 841 23-33

United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America,

Plaintiff-Appellee,

v.

Felix GALLEGO, a.k.a. Ica, Evelio Rizo Sr., Lazaro Gallego Jr., a.k.a. Gamba, Abel Rizo,

Defendants-Appellants.

No. 97-5293.
April 13, 2001.

Paul Morris, Law Offices of Paul Morris, P.A., Rhonda Anne Anderson, Rhonda A. Anderson, P.A., Coral Gables, FL, Richard L. Rosenbaum, Law Offices of Richard L. Rosenbaum, Fort Lauderdale, FL, for Defendants- Appellants.
Madeleine R. Shirley, Asst. U.S. Atty., Miami, FL, for Plaintiff-Appelle.
Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT, HILL and POLITZ [FN*], Circuit Judges.

FN* Honorable Henry A. Politz, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

TJOFLAT, Circuit Judge:

This case is an appeal by members of a drug conspiracy. Although the appellants raise a host of issues on appeal, [FN1] the only claim that merits discussion are that their sentences

violate Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). We affirm the convictions and sentences.

FN1. We grant Evelio Rizo Sr.'s Motion to Adopt Issues of Co- Appellants, filed August 16, 1999.

I.

Four appellants are before us in the instant appeal: Felix Gallego ("Felix"), Lazaro Gallego Jr. ("Lazaro"), Abel Rizo ("Abel"), and Evelio Rizo Sr. ("Rizo Sr."). [FN2] The appellants were indicted by a Southern District of Florida grand jury on October 9, 1996, on charges of conspiracy, possession of cocaine, robbery, and firearms violations. [FN3] The indictment was sealed by order of the court.

FN2. Felix and Lazaro are brothers. Abel is the son of Rizo Sr.

FN3. The October 9 indictment was a second superseding indictment. The first indictment was handed down on January 24, 1996, and a superseding indictment followed on May 31, 1996. None of the appellants was charged in the first indictment, and, of the appellants, only Abel and Rizo Sr. were charged in the first superseding indictment. We refer to the second superseding indictment throughout simply as "the indictment." This second superseding indictment charged fifteen individuals in seventeen counts. It charged the appellants as follows:
Count One--Conspiracy to possess cocaine, with intent to distribute, from June 25, 1987 to March 1995, in violation of 21 U.S.C. s 841(a)(1) and 18 U.S.C. s 2, all

in violation of 21 U.S.C. s 846 (Abel, Felix, Lazaro, and Rizo Sr.);

Count Two--Possession of cocaine, with intent to distribute, on June 29, 1992, in violation of 21 U.S.C. s 841(a)(1) and 18 U.S.C. s 2 (Abel);

Count Three--Obstruction or delay of commerce by robbery ("Hobbs Act robbery") on June 29, 1992, in violation of 18 U.S.C. ss 1951(a) and 2 (Abel);

Count Four--Using and carrying a firearm during the commission of a crime of violence and drug trafficking crime on June 29, 1992, in violation of 18 U.S.C. ss 924(c) and 2 (Abel);

Count Five--Attempted Hobbs Act robbery on February 20, 1993, in violation of 18 U.S.C. ss 1951(a) and 2 (Felix and Rizo Sr.);

Count Six--Using and carrying a firearm during the commission of a crime of violence and drug trafficking crime on February 20, 1993, in violation of 18 U.S.C. ss 924(c) and 2 (Felix and Rizo Sr.);

Count Seven--Hobbs Act robbery in late 1992 or early 1993, in violation of 18 U.S.C. ss 1951(a) and 2 (Lazaro);

Count Eight--Attempted Hobbs Act robbery on April 30, 1993, in violation of 18 U.S.C. ss 1951(a) and 2 (Abel, Felix, Lazaro, and Rizo Sr.);

Count Nine--Attempted Hobbs Act robbery on November 24, 1993, in violation of 18 U.S.C. ss 1951(a) and 2 (Abel and Rizo Sr.);

Count Ten--Using and carrying a firearm during the commission of a crime of violence and drug trafficking crime on November 24, 1993, in violation of 18 U.S.C. §§ 924(c) and 2 (Abel and Rizo Sr.);

Count Eleven--Possession of cocaine, with intent to distribute, in March 1994, in violation of 21 U.S.C. §

841(a)(1) and 18 U.S.C. § 2 (Rizo Sr.); Count Fourteen--Hobbs Act robbery on November 9, 1994, in violation of 18 U.S.C. §§ 1951(a) and 2 (Rizo Sr.); Count Sixteen--Possession of cocaine, with intent to distribute, on December 31, 1994, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Lazaro). Because the other eleven individuals named in the indictment are not before us, we address neither those individuals nor any counts of the indictment charging only those individuals.

The appellants were allegedly members of a group, comprised of more than fifteen individuals, that carried out home invasions and robberies to obtain money, drugs, and other valuable items from persons believed to be drug traffickers. Such robberies are generally known as "rip-offs." The usual modus operandi was for a member of the group (the "santo") to obtain information about other individuals who sold narcotics. (The santo would receive a larger portion of the robbery proceeds for his role in the offense.) The santo would report the information to Rizo Sr. and his son Evelio Rizo Jr. ("Evelito"). Next, the santo would make a couple of small, controlled drug purchases from the targeted victim while other members were conducting surveillance to obtain information about where the victim kept the drugs and drug proceeds (the "stash-house"). Once the stash-house was identified, members would conduct the rip-off by posing as police officers and forcibly robbing the victims by raiding the stash-house, often at gunpoint. Proceeds of the rip-off were taken back to the Rizos' home in Hialeah, Florida, where Evelito and Rizo Sr. would tally the robbery proceeds and distribute them to members of the group. If any member of the group was arrested, the group would post bond and hire counsel to ensure that the member would not cooperate with authorities and would not provide incriminating

information about the group.

Abel and Rizo Sr. were arrested on June 3 and July 10, 1996, respectively, pursuant to the first superseding indictment. On November 15, 1996, they entered pleas of not guilty to the charges in the second superseding indictment. Felix was arrested on October 29, 1996, and Lazaro was arrested on November 6, 1996. They also pleaded not guilty. The four appellants went to trial, along with two others. [FN4] A jury found the appellants guilty as charged (except Rizo Sr., who was acquitted on Count Eleven, a possession count). The district court subsequently dismissed Counts Six and Ten (firearms counts) against Rizo Sr., pursuant to Fed.R.Crim.P. 29. [FN5] The court denied all other motions by the appellants for acquittals or new trials. Thereafter, the court imposed the following sentences: Abel received 468 months' imprisonment, Felix received 324 months' imprisonment, and Lazaro and Rizo Sr. each received life imprisonment. Each appellant also was sentenced to five years' supervised release.

> FN4. Jerry Dean Crespo and Leonardo Cuellar went to trial with the appellants. Crespo was convicted of Counts One and Sixteen; Cuellar was convicted of Counts One, Five, Six, Eight, Nine, Ten, Fourteen, and Fifteen (attempted Hobbs Act robbery on November 25, 1994). Crespo and Cuellar initially took appeals with the appellants, but subsequently dropped their appeals. Of the remaining nine members of the fifteen indicted conspirators, three entered guilty pleas before trial, two were arrested after the trial, and four (including Evelito) are fugitives.
>
> FN5. Rule 29 provides that the district court "shall order the entry of judgment of acquittal ... if the

evidence is insufficient to sustain a conviction." Fed.R.Crim.P. 29(a). The court had reserved decision on Rizo Sr.'s motion for judgment of acquittal until after the jury verdict, pursuant to Fed.R.Crim.P. 29(b).

II.

The appellants contend that their sentences violate Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). They did not raise timely constitutional objections on the Apprendi issues, [FN6] and we therefore review their Apprendi claims for plain error. See United States v. Candelario, 240 F.3d 1300, 1303-06 (11th Cir.2001). The four prongs of plain error review are: (1) there must be error; (2) the error must be plain; (3) the error must affect the appellant's substantial rights; and (4) the error must "seriously affect[ ] the fairness, integrity, or public reputation of judicial proceedings." Johnson v. United States, 520 U.S. 461, 467, 117 S.Ct. 1544, 1549, 137 L.Ed.2d 718 (1997); see also Fed.R.Crim.P. 52(b); United States v. Swatzie, 228 F.3d 1278, 1281 (11th Cir.2000). Before we may correct an error that was not timely raised, all four prongs must be satisfied. See Candelario, 240 F.3d at 1309.

FN6. None of the four appellants raised a constitutional objection at or before sentencing based on the requirement that the jury must determine the quantity of drugs beyond a reasonable doubt. See generally United States v. Candelario, 240 F.3d 1300 (11th Cir.2001).

A.

Abel received concurrent sentences of 168 months' imprisonment on Count One (conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. s 846) and Count

Two (possession of cocaine, with intent to distribute, in violation of 21 U.S.C. s 841(a)(1) and 18 U.S.C. s 2). He also received concurrent terms of five years' supervised release on these counts. [FN7]

> FN7. Abel was sentenced at an offense level of 35 and a criminal history category of I. His sentences, when cumulated, mandated 468 months' imprisonment. In addition to the concurrent terms of 168 months' imprisonment for Counts One and Two, Abel received 60 months' imprisonment on each of Counts Three, Eight, and Nine; 60 months' imprisonment on Count Four; and 240 months' imprisonment on Count Ten. The sentences for Counts One, Two, Three, Eight, and Nine were to run concurrently; the sentences for Counts Four and Ten were to run consecutively to each other and consecutive to the concurrent sentences on the other counts. (Counts Four and Ten were firearm counts, which meant the sentences on those counts had to be imposed consecutively, pursuant to 18 U.S.C. § 924(c)(1)(D)(ii) and U.S.S.G. § 5G1.2.) Terms of three years' supervised release were imposed on each of Counts Three, Four, Eight, Nine, and Ten; all supervised release terms were to run concurrently.

The Supreme Court established in Apprendi, 120 S.Ct. at 2362-63, that "any fact [other than a prior conviction] that Increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Applying Apprendi's constitutional principle to drug cases proceeding under 21 U.S.C. § 841, we have held that the quantity of drugs must be charged in the indictment and proven to a jury beyond a

reasonable doubt if a defendant is to be sentenced under a penalty provision of 21 U.S.C. § 841 (such as section 841(b)(1)(A) or section 841(b)(1)(B)) that contains a quantity amount. United States v. Rogers, 228 F.3d 1318, 1327 (11th Cir.2000). If an indictment contains no allegation of drug quantity and the jury convicts but fails to make a quantity determination, a defendant is subject to the penalties prescribed in 21 U.S.C. § 841(b)(1)(C), which requires a sentence of not more than twenty years' imprisonment for possession of an unspecified quantity of cocaine. [FN8] Id. at 1327.

> FN8. 21 U.S.C. § 841(b)(1)(C) reads, in pertinent part:
> In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years .... [and if] any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years.... Cocaine is a schedule II drug. 21 U.S.C. § 812, Schedule II. 21 U.S.C. § 841(b)(1)(A) provides a penalty of ten years to life imprisonment for possession of at least 5 kilograms of cocaine. 21 U.S.C. § 841(b)(1)(B) provides a penalty of five to forty years' imprisonment for possession of at least 500 grams, but less than 5 kilograms, of cocaine.

We have held, however, that "there is no error, plain or otherwise, under Apprendi where the term of imprisonment is within the statutory maximum set forth in § 841(b)(1)(C) for a cocaine offense without regard to drug quantity." United States

v. Gerrow, 232 F.3d 831, 834 (11th Cir.2000); cf. Candelario, 240 F.3d at 1306 ("[T]here is an error if the defendant's sentence exceeds the maximum sentence allowed by a statute without regard to quantity."). In the instant case, Abel's sentences of 168 months' imprisonment on Counts One and Two fall below the twenty year maximum prescribed by section 841(b)(1)(C). There is therefore no error under Apprendi. [FN9]

FN9. 21 U.S.C. § 841(b)(1)(C) requires a supervised release term of "at least 3 years in addition to such term of imprisonment." Abel's sentences of five years' supervised release on Counts One and Two are not plain error. See Gerrow, 232 F.3d at 835 (holding that a term of more than three years' supervised release under 21 U.S.C. § 841(b)(1)(C) does not meet the "plain" requirement of plain error review, but declining to decide whether 18 U.S.C. § 3583 provides the maximum term of supervised release for a defendant sentenced under 21 U.S.C. § 841(b)(1)(C)); see also United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir.2001) (holding that a sentence of five years' supervised release under 21 U.S.C. § 841(b)(1)(C) is not error at all, because section 841(b)(1)(C) provides for "at least 3 years" of supervised release and 18 U.S.C. § 3583 does not provide otherwise); United States v. Heckard, 238 F.3d 1222, 1236-37 (10th Cir.2001) (same); United States v. Aguyo-Delgado, 220 F.3d 926, 933 (8th Cir.2000) (same). But see United States v. Meshack, 225 F.3d 556, 578 (5th Cir.2000) (holding that 18 U.S.C. § 3583 limits a sentence of supervised release imposed under 21 U.S.C. § 841(b)(1)(C) to a term of three years).

B.

Count One of the indictment charged Felix with conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. s 846. The jury convicted Felix and the district court sentenced him, pursuant to 21 U.S.C. s 841(b)(1)(A), to a term of 324 months' imprisonment and five years' supervised release on Count One. [FN10]

> FN10. Felix was also sentenced to 240 months' imprisonment on Counts Five and Eight and 60 months imprisonment on Count Six. The terms of imprisonment were to be served concurrently on all except Count Six, which was a consecutive sentence. (Count Six was a firearm count, which meant that the sentence on that count had to be imposed consecutively, pursuant to 18 U.S.C. § 924(c)(1)(D)(ii) and U.S.S.G. § 5G1.2.) This meant that Felix's sentences combined to total 384 months' imprisonment. The district court sentenced Felix based on an offense level of 40 and a criminal history category of I. Supervised release terms of three years were set as to Counts Five, Six, and Eight. All supervised release terms were to run concurrently.

Felix satisfies the first two prongs of plain error review. His sentence of 324 months' imprisonment exceeds the maximum of twenty years' imprisonment prescribed by section 841(b)(1)(C). This error is plain. See Candelario, 240 F.3d at 1309 (holding that an Apprendi error in a drug case is plain on direct appeal).

Felix fails, however, to satisfy the third prong of plain error review because he is unable to carry his burden of demonstrating that the error affected his substantial rights. As he admitted in an objection to the Pre- Sentence Investigation Report ("PSI") and at the sentencing hearing, Felix personally

possessed four kilograms of cocaine during a rip-off in October 1993. [FN11] Therefore, a minimum quantity of four kilograms was not in controversy. Four kilograms of cocaine exceeds the threshold amount necessary for sentencing under 21 U.S.C. § 841(b)(1)(B), which requires a finding of at least 500 grams of cocaine. Because section 841(b)(1)(B) prescribes a sentencing range of five to forty years' imprisonment, and because Felix's sentence of 324 months' imprisonment is less than forty years, we find that Felix's substantial rights were not violated by the error in his sentencing. [FN12] *See United States v. Pease*, 240 F.3d 938, 944 (11th Cir.2001). We need not visit the fourth prong of plain error review since Felix has not satisfied the third prong. *See Candelario*, 240 F.3d at 1312.

FN11. At trial, Jorge Gonzalez (a co-conspirator who had pleaded guilty) testified that Felix was in actual possession of four kilograms of cocaine during this rip-off. He further testified that an additional fifty kilograms of cocaine were obtained during the rip-off. Felix only conceded possession of four kilograms of cocaine, and we therefore rely upon that number. (Felix stated in his objections to the PSI and at sentencing that his base offense level should be calculated on the basis of four kilograms of cocaine. The defense arrived at this amount because it was the lowest quantity that Felix was "alleged to have *personally* possessed" (emphasis added).)

FN12. 21 U.S.C. § 841(b)(1)(B) requires a supervised release term of "at least 4 years in addition to such term of imprisonment." Felix's sentence of five years' supervised release on Count One is not plain error. *See Gerrow*, 232 F.3d at 835.

C.

Lazaro was sentenced on Count One (conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. § 846) and Count Sixteen (possession of cocaine, with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2) to concurrent life sentences. [FN13] Concurrent terms of five years' supervised release were also set for these counts.

> FN13. Lazaro was also sentenced on Counts Seven and Eight to concurrent terms of 240 months' imprisonment; these sentences were to run concurrently with the life sentences on Counts One and Sixteen. Concurrent three year terms of supervised release were set as to Counts Seven and Eight. The district court sentenced Lazaro based on an offense level of 44 and a criminal history category of III.

Lazaro satisfies the first two prongs of plain error review. His sentences of life imprisonment exceed the maximum of twenty years' imprisonment prescribed by 21 U.S.C. § 841(b)(1)(C), and the error is plain.

Lazaro fails to satisfy the third prong of plain error review--his substantial rights were not affected. Count Sixteen was based on a rip-off that occurred on December 31, 1994. The only testimony at trial relating to an amount involved in the rip-off was that 326 kilograms of cocaine were obtained. Of these 326 kilograms, Lazaro personally received twenty-five kilograms for his active role in the rip-off. [FN14] Lazaro did not object to or contest this amount at trial, and he did not put on any contrary testimony (either at trial or at

sentencing) as to a different amount. [FN15] Given the undisputed testimony that 326 kilograms of cocaine were involved in Count Sixteen, we find that there was no way the jury could convict on Count Sixteen and yet determine that the quantity involved was less than five kilograms of cocaine. 21 U.S.C. § 841(b)(1)(A) authorizes a sentence of ten years to life imprisonment for possession of five kilograms or more of cocaine. Because the jury must have found at least five kilograms on Count Sixteen, Lazaro's substantial rights were not affected by a sentence of life imprisonment on Count Sixteen, pursuant to section 841(b)(1)(A). *See United States v. Wims*, 207 F.3d 661 (11th Cir.2001).

FN14. This testimony came from Jorge Gonzalez. *See supra* note 11. Gonzalez testified that he was present during this rip-off and then testified as to the quantity involved. Additionally, Carlos Gustavo De La Teja (another co-conspirator who had pleaded guilty) testified for the prosecution that the amount was 325 kilograms, and that Lazaro received 25 kilograms as his share of the rip-off. He further testified that Lazaro and Jerry Dean Crespo (a co-defendant) sold him 14 kilograms that they had received from the rip-off.

FN15. Lazaro did object to the attribution of 326 kilograms to him from the rip-off at issue, but he based his objection solely on the unreliability of the witnesses who testified as to drug quantity. He did not offer any contrary testimony on quantity. Rather, Lazaro only put on alibi testimony by four defense witnesses (including Lazaro himself). The alibi was

that Lazaro was at a New Year's Eve party the entire evening (from 6:00 P.M. to 2:00 A.M.), which would have rendered it impossible for him to be involved in the rip-off.

Neither were Lazaro's substantial rights affected by a sentence of life imprisonment on Count One (conspiracy). The jury's conviction on Count Sixteen necessarily subsumes the conviction on Count One for *Apprendi* review purposes, for the possession which constituted Count Sixteen was a part of the conspiracy. [FN16] Therefore, a finding of at least five kilograms on Count Sixteen suffices as a finding of at least five kilograms on Count One. Lazaro's substantial rights were thus not affected by a sentence of life imprisonment on Count One, pursuant to section 841(b)(1)(A). [FN17]

FN16. Count Sixteen was listed as overt act number 33 in Count One of the indictment. Further, Count One alleged that on December 31, 1994, Lazaro (and others) possessed 326 kilograms of cocaine in the robbery as part of the conspiracy. Count One also alleged, as overt act number 36, that Lazaro and Jerry Dean Crespo delivered approximately 13 kilograms of cocaine to Carlos Gustavo De La Teja. *See supra* note 14.

FN17. Because we find that sentencing under section 841(b)(1)(A) was proper, we hold that Lazaro's terms of five years' supervised release are proper. *See* 21 U.S.C. § 841(b)(1)(A) (requiring that the court impose "at least 5 years" of supervised release when a defendant possesses five or more kilograms of cocaine).

Because Lazaro fails to satisfy the third prong of plain error review, we need not visit the fourth prong.

D.
1.

Rizo Sr. was sentenced to a term of life imprisonment on Count One (conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. § 846). The court also imposed a term of five years' supervised release for Count One. [FN18]

> FN18. The district court also imposed sentences of 240 months' imprisonment on Counts Five, Eight, Nine, and Fourteen; all sentences were to run concurrently. Sentences of three years' supervised release were imposed on each of these other five counts; all supervised released terms were to run concurrently. Rizo Sr.'s offense level was 46 and his criminal history category was I.

Rizo Sr. satisfies the first two prongs of plain error review. His sentence of life imprisonment exceeds the maximum of twenty years' imprisonment prescribed by 21 U.S.C. § 841(b)(1)(C). This error is plain.

Rizo Sr. fails, however, to satisfy the third prong of plain error review, for his substantial rights were not affected by the error. The indictment charged, as the first overt act in furtherance of the conspiracy, that Rizo Sr. drove a car "containing ten (10) packages of cocaine wrapped in duct tape" in Salem County, New Jersey on June 25, 1987. The ten packages each contained one kilogram of cocaine. Rizo

Sr. pleaded guilty in New Jersey state court to possession of these ten kilograms of cocaine, which were confiscated in a traffic stop. Counsel for Rizo Sr. conceded at closing argument, "[The prosecutor] is right, there is no question but that [Rizo Sr.] had the ten kilograms of cocaine, he pled guilty to possessing the ten kilograms of cocaine." Because these ten kilograms of cocaine from the New Jersey conviction constituted part of the conspiracy charged in Count One, the jury necessarily found more than five kilograms of cocaine in connection with Count One. 21 U.S.C. § 841(b)(1)(A), which authorizes a sentence of ten years to life imprisonment, requires a finding of at least five kilograms of cocaine. Because the jury found that more than five kilograms of cocaine were involved in Count One, Rizo Sr.'s substantial rights were not affected by a sentence of life imprisonment. [FN19]

FN19. We would affirm Rizo Sr.'s sentence even if this ten kilogram quantity were not a part of the conspiracy. Although more than 150 kilograms of cocaine were attributed to Rizo Sr. at sentencing as part of the relevant conduct, none of the other counts for which he was convicted carried drug quantities as necessary components of the jury's verdict. Therefore, without the ten kilogram amount that we have deemed a necessary part of Count One, the district court could have properly sentenced Rizo Sr. to a maximum of only twenty years' imprisonment on Count One. However, this would not be grounds for reversal, notwithstanding the court's imposition of a life sentence, because the error would not have affected Rizo Sr.'s substantial rights. This is because, on remand, the district court would be obligated

under the Sentencing Guidelines to sentence Rizo Sr. to a combined term of imprisonment that comports with his "total punishment." U.S.S.G. § 5G1.2 ("Sentencing on Multiple Counts of Conviction"). ("Total punishment" is the "combined length of the sentences," which is "determined by the adjusted combined offense level." U.S.S.G. § 5G1.2, Commentary.) If the maximum sentence for Count One was twenty years, consistent with 21 U.S.C. § 841(b)(1)(C), then the district court would have to fashion Rizo Sr.'s sentences consecutively (rather than concurrently) until it could produce a "combined sentence equal to the total punishment." U.S.S.G. § 5G1.2(d). Rizo Sr.'s offense level of 46 (and criminal history category of I) dictate mandatory life imprisonment, thereby requiring the district court to impose consecutive sentences sufficient to equal life imprisonment. Because consecutive sentences combining to equal life imprisonment are effectively the same as one sentence of life imprisonment (served with some lesser, concurrent sentences), Rizo Sr.'s substantial rights would not be affected if we affirmed the sentence on Count One. *See United States v. Sturgis*, 238 F.3d 956, 960-61 (8th Cir.2001) (holding that there was not plain error, notwithstanding *Apprendi*, in a sentence that exceeded the statutory maximum without regard to drug quantity due to a lack of "prejudice," since the district court, on remand, would have to impose the same "total punishment" through imposing consecutive sentences pursuant to U.S.S.G. § 5G1.2(d)); *United States v. White*, 238 F.3d 537, 543 (4th Cir.2001) (same); *United States v. Page*, 232 F.3d 536, 544-45 (6th Cir.2000) (same).

Because Rizo Sr.'s substantial rights were not affected by the error in his sentencing, we need not address the fourth prong of plain error review. [FN20]

> FN20. Because we find that sentencing under section 841(b)(1)(A) was proper, Rizo Sr.'s term of five years' supervised release was also proper. *See supra* note 17.

2.

Rizo Sr. also asserts that *Apprendi* requires the jury to determine whether he was a leader or organizer for purposes of sentencing. Because we have held that *Apprendi* does not apply to relevant conduct under the Guidelines, *United States v. Maldenaldo Sanchez*, 242 F.3d 1294, ---- (11th Cir.2001), we hold that there was no *Apprendi* error in the districtcourt's failure to require the jury to determine whether Rizo Sr. was a leader or organizer. [FN21] *See United States v. Jackson*, 240 F.3d 1245, 1249 (10th Cir.2001) (holding that *Apprendi* does not alter a district court's ability to adjust a defendant's offense level for role in the offense, pursuant to U.S.S.G. § 3B1.1); *United States v. Caba*, 241 F.3d 98, 101 (1st_ Cir.2001) (same).

> FN21. We also reject Rizo Sr.'s contention that the district court improperly adjusted his offense level four levels for his role as a leader or organizer in the offense, pursuant to U.S.S.G. § 3B1.1(a). Given the overwhelming evidence of Rizo Sr.'s coordination of the rip-off scheme, the district court's determination

that he was a leader or organizer was not clear error. *See United States v. Rodriguez De Varon*, 175 F.3d 930, 938 (11th Cir.1999) (en banc).

III.

The appellants raise a number of other issues, all of which fail. [FN22] Because there was no error in the appellants' convictions, and because any errors in their sentencing did not affect their substantial rights, the convictions and sentences are

FN22. The appellants waived the issue of the district court's need to recuse itself by failing to raise it at the first available opportunity. *See Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Florida, Inc.*, 140 F.3d 898, 913 (11th Cir.1998). Rizo Sr.'s contention that the district court failed to conduct an adequate *McLain* hearing (*United States v. McLain*, 823 F.2d 1457 (11th Cir.1987)) regarding his lawyer's continuing representation fails because Rizo Sr. validly waived his right to conflict- free counsel. The appellants' objections based upon the sufficiency of the evidence fail because the evidence was not insufficient as a matter of law and the evidence supported the convictions. The appellants' contentions that the district court abused its discretion in various evidentiary rulings at trial are meritless. Finally, there was no error in the Government's closing argument, particularly since the allegedly prejudicial references were merely rebuttal to inflammatory defense comments during closing.

AFFIRMED.

HILL, Circuit Judge, concurs in the result.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 97-5293-DD

Filed AUG 3, 2001

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FELIZ GALLEGO, a.k.a. Ica,
EVELIO RIZO, SR.,
LAZARO GALLEGO, JR., a.k.a. Gamba,
ABEL RIZO,

Defendant-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19__,
___F.2d___).

Before: TJOFLAT, HILL and POLITZ*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____
UNITED STATES CIRCUIT JUDGE

*Honorable Henry A. Politz, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

UNITED STATES CODE ANNOTATED
TITLE 21. FOOD AND DRUGS
CHAPTER 13--DRUG ABUSE PREVENTION AND CONTROL SUBCHAPTER I--CONTROL AND ENFORCEMENT

PART D--OFFENSES AND PENALTIES

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(I) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of

ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if

the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(I) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more

than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term

of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5

years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if

the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such persons shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution. (A) In general. Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

(B) Definitions. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally--

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required; shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this

subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals.

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under Title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to is, after such knowledge is acquired, such violation shall be fined under Title 18 or imprisoned not more than one year, or both.

Supreme Court, U.S.
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No. 01-762

In the Supreme Court of the United States

FELIX GALEGO, AKA ICA, AND LAZARO GALLEGO, JR., AKA GAMBA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' sentences for drug-trafficking offenses should be reversed on plain-error review under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because they exceed the otherwise-applicable statutory maximum based on a fact that was not alleged in the indictment or proved to the jury beyond a reasonable doubt.

2. Whether *Apprendi* v. *New Jersey* requires a district court to calculate a defendant's sentence under the federal Sentencing Guidelines based solely on facts that were found by the jury beyond a reasonable doubt.

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In the Supreme Court of the United States

No. 01-762

FELIX GALEGO, AKA ICA, AND LAZARO GALLEGO, JR., AKA GAMBA, PETITIONERS

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 247 F.3d 1191.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 2001. A petition for rehearing was denied on August 3, 2001 (Pet. App. 21-22). On September 26, 2001, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 10, 2001. The petition for a writ of certiorari was filed on November 29, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners were

each convicted of conspiracy to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846, and attempted robbery affecting interstate commerce, in violation of 18 U.S.C. 1952. In addition, petitioner Lazaro Gallego was convicted of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841, and robbery affecting interstate commerce, in violation of 18 U.S.C. 1951; petitioner Felix Gallego was convicted of a second count of attempted robbery affecting interstate commerce, in violation of 18 U.S.C. 1952, and of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Lazaro Gallego was sentenced to life imprisonment; Felix Gallego was sentenced to 384 months' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed. Pet. App. 1-20.

1. Petitioners, who are brothers, were members of a "rip-off" gang in South Florida that stole drugs and money from drug dealers. Gang members would identify a suspected drug dealer as a target and conduct surveillance of the target's operation, often making small drug purchases to discover where the target kept his drugs and money. Gang members, sometimes posing as police officers, would then kidnap members of the target's operation or commit home invasions or robberies to obtain the target's drugs and money. Pet. App. 4; Lazaro Gallego Presentence Report (PSR) 6-25; Felix Gallego Revised PSR 6-25.

Lazaro Gallego was personally involved in several of the gang's operations. For example, he participated in an armed robbery in late 1992 or early 1993 that yielded 5 kilograms of cocaine, a kidnapping and home invasion in April 1993, and a robbery of a "stash house" in December 1994 that yielded 326 kilograms of cocaine,

25 kilograms of which were allocated to him for his part in the robbery. Lazaro Gallego PSR 11-13, 21.

Felix Gallego also participated in several gang operations, including the April 1993 kidnapping and home invasion. In addition, he took part in a home invasion and robbery in February 1993 in which the victim turned out to be the neighbor of a drug dealer, not a drug dealer himself. Felix Gallego Revised PSR 11-13.

2. On October 9, 1996, a federal grand jury in the Southern District of Florida returned a second superseding indictment charging petitioners and other members of the gang with various crimes. Both petitioners were charged with conspiracy to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846, and with attempted robbery affecting interstate commerce, in violation of 18 U.S.C. 1952 (the Hobbs Act). Lazaro Gallego was also charged with one count of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841, and one count of robbery affecting interstate commerce, in violation of 18 U.S.C. 1952. Felix Gallego was also charged with a second count of attempted robbery, in violation of 18 U.S.C. 1952, and one count of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c).

The second superseding indictment did not allege that petitioners' drug conspiracy offense or Lazaro Gallego's substantive drug offense involved any specific or threshold quantity of cocaine. See Second Superseding Indictment 2, 18 (alleging that those offenses involved "a mixture and substance containing a detectable amount of cocaine"). The "overt acts" section of the conspiracy count did, however, allege several incidents involving specific quantities of cocaine. See, *e.g.*,

id. at 9 (alleging that Lazaro Gallego and co-conspirators took 326 kilograms of cocaine from a stash house in December 1994).

At trial, petitioners and their co-defendants did not ask that the jury be instructed to find the quantities of cocaine involved in their offenses, and the district court gave no such instruction. The jury found petitioners guilty on all counts.

3. In petitioners' PSRs, the Probation Office determined that Lazaro Gallego's offenses involved at least 150 kilograms of cocaine and that Felix Gallego's offenses involved between 50 and 150 kilograms of cocaine. The Probation Office noted that both petitioners were subject to a maximum term of life imprisonment under 21 U.S.C. 841(b)(1)(A), because their drug offenses involved at least 5 kilograms of cocaine. Lazaro Gallego PSR 26, 38; Felix Gallego Revised PSR 26, 38.

At sentencing, the district court accepted the Probation Office's findings with respect to the quantities of cocaine involved in petitioners' offenses. Accordingly, the court determined that, under the Sentencing Guidelines, Lazaro Gallego's sentencing range was life imprisonment and Felix Gallego's sentencing range was 292 to 365 months' imprisonment. The court sentenced Lazaro Gallego to concurrent terms of life imprisonment on the two drug-trafficking counts and 240 months' imprisonment on the Hobbs Act count. The court sentenced Felix Gallego to a total of 384 months' imprisonment consisting of concurrent terms of 324 months on the drug conspiracy count and 240 months on the two Hobbs Act counts and a consecutive term of 60 months on the firearms count. 8/22/97 Lazaro Gallego Sent. Tr. 37-38, 41-42; 7/11/97 Felix Gallego Sent. Tr. 2-10.

4. While the case was on appeal, this Court held in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), that,

"[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." For the first time on appeal, petitioners claimed that the district court violated *Apprendi* by imposing sentences for the drug-trafficking offenses that exceeded the otherwise-applicable statutory maximum based on a fact, drug quantity, that was not alleged in the indictment or found by the jury beyond a reasonable doubt.

The court of appeals evaluated petitioners' *Apprendi* claims under the plain-error standard of review. The court relied on its earlier decision in *United States* v. *Candelario*, 240 F.3d 1300, 1303-1306 (11th Cir.), cert. denied, 121 S. Ct. 2535 (2001), which held that the plain-error standard applies to *Apprendi* claims not raised in the district court. The court thus considered whether petitioners could establish that (1) there was error; (2) that was plain; (3) that affected their substantial rights; and (4) that "seriously affected the fairness, integrity, or public reputation of judicial proceedings." Pet. App. 6 (citing *Johnson* v. *United States*, 520 U.S. 461, 467 (1997)).

The court of appeals held that petitioners could satisfy the first two components of the plain-error standard. The court explained that the district court committed error, which was plain in light of *Apprendi*, in sentencing petitioners to terms of more than 20 years' imprisonment, the maximum sentence prescribed by 21 U.S.C. 841(b)(1)(C) for drug offenses involving any detectable quantity of cocaine. Pet. App. 10, 12.

The court of appeals also held, however, that neither petitioner could show that the error affected his substantial rights. With respect to Lazaro Gallego, the court reasoned, based on the trial testimony, that no

rational jury could have convicted him of possession of cocaine obtained in the December 1994 robbery of the stash house, as the jury in this case did, without also determining that he possessed at least 5 kilograms of that cocaine, the amount necessary to trigger a sentence of life imprisonment under 21 U.S.C. 841(b)(1)(A). The court noted that Lazaro Gallego had not presented any evidence to dispute his co-conspirators' trial testimony that he received 25 kilograms of cocaine from the December 1994 robbery. With respect to Felix Gallego, the court observed that he admitted at sentencing to possessing at least 4 kilograms of cocaine during an October 1993 robbery, which exceeds the amount necessary to trigger a sentence of up to 40 years' imprisonment under 21 U.S.C. 841(b)(1)(B). The court also noted that Felix Gallego's admission was consistent with the trial testimony of a co-conspirator. Accordingly, the court held that petitioners were not entitled to reversal of their sentences under the plain-error standard. Pet. App. 10-14.

ARGUMENT

1. Petitioners contend (Pet. 13-18) that their enhanced sentences for drug trafficking offenses were imposed in violation of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because they depend on a fact, drug quantity, that was not alleged in the indictment or found by the jury beyond a reasonable doubt. Petitioners raised no such challenge in the district court. On January 4, 2002, this Court granted certiorari in *United States* v. *Cotton*, No. 01-687, to consider the appropriate analysis of *Apprendi* challenges, raised for the first time on appeal, to sentences that exceed the otherwise-applicable statutory maximum based on a fact not alleged in the indictment. To the extent that peti-

tioners have suggested areas of tension among the circuits in the application of the plain-error standard to *Apprendi* claims, the Court's decision in *Cotton* may resolve any such tension.[1]

The Court should not, however, hold the petition in this case for disposition in light of *Cotton*. Even if the Court were to adopt the Fourth Circuit's approach in *Cotton*, rather than the approach urged by the government, petitioners' sentences still would not require reversal under the plain-error standard. That is because petitioners, unlike the respondents in *Cotton*, were convicted of multiple offenses, the sentences for which could (and should under the Sentencing Guidelines) run consecutively to produce the same sentences that petitioners actually received.

a. Under Section 5G1.2(d) of the Sentencing Guidelines, if no count of conviction is sufficient by itself to authorize imposition of the full sentence prescribed by the Guidelines, the district court is required to run the terms on separate counts consecutively to the extent necessary to achieve the Guidelines sentence.[2] See 18

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[1] In addition, although petitioners claim (Br. 13-15) that the Court should resolve a circuit conflict over whether the defendant or the government bears the burden of persuasion on the third component of the plain-error standard when the error became clear only after the district court proceedings, that claim does not merit the Court's review for the reasons given in our brief in opposition in *O'Brien* v. *United States*, No. 00-896. The Court denied certiorari in that case. 121 S. Ct. 2241 (2001). We are providing petitioners' counsel with a copy of our brief in opposition in *O'Brien*.

[2] Section 5G1.2(d) provides:

> If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run

U.S.C. 3584 (permitting imposition of consecutive sentences). Consequently, where a defendant has been convicted of multiple offenses, most circuits, including the Fourth Circuit, have affirmed sentences imposed in violation of *Apprendi* if the permissible maximum sentences for those offenses, run consecutively, would equal or exceed the defendant's actual total sentence. See *United States* v. *Angle*, 254 F.3d 514, 518-519 (4th Cir.) (en banc), cert. denied, 122 S. Ct. 309 (2001); accord, *e.g.*, *United States* v. *Kentz*, 251 F.3d 835, 842 (9th Cir. 2001), petition for cert. pending, No. 01-7238 (docketed Nov. 5, 2001); *United States* v. *Sturgis*, 238 F.3d 956, 960-961 (8th Cir.), cert. denied, 122 S. Ct. 182 (2001); *United States* v. *Price*, 265 F.3d 1097, 1108-1109 (10th Cir. 2001) (collecting cases), petition for cert. pending, No. 01-8242 (docketed Jan. 30, 2002).

There is no conflict on this issue that warrants the Court's review at this time. Two circuits have taken a different approach to whether Guidelines § 5G1.2(d) can support affirmance of a sentence despite an *Apprendi* error. See *United States* v. *Vasquez-Zamora*, 253 F.3d 211, 214 (5th Cir. 2001) (holding that district court has discretion whether to run sentences consecutively or concurrently and remanding for district court to exercise its discretion); *United States* v. *Bradford*, 246 F.3d 1107, 1114-1115 (8th Cir. 2001) (per curiam) (similar). But the Eighth Circuit has granted rehearing en banc to consider the issue, see *United States* v. *Diaz*, 270 F.3d 741 (2001) (granting rehearing en banc in relevant part of decision reported as *United States* v. *Sherman*,

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consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.

262 F.3d 784 (2001)), and the government has asked the Fifth Circuit to reconsider en banc the position taken in *Vasquez-Zamora* that stacking is discretionary, see Gov't Pet. for Reh'g in *United States* v. *Randle*, 259 F.3d 319 (2001).

b. Here, Lazaro Gallego was convicted of four separate offenses, each of which carried a statutory maximum sentence of 20 years' imprisonment, without regard to drug quantity (or any other fact that was not alleged in the indictment or proved to the jury beyond a reasonable doubt). He was subject to a sentence of life imprisonment under the Sentencing Guidelines. The district court would therefore have been required under Guidelines § 5G1.2(d) to run his sentences on the four counts consecutively for a total sentence of 80 years, the effective equivalent of a sentence of life imprisonment since he was 26 years old at the time of sentencing.

Similarly, Felix Gallego was convicted of three offenses, each of which carried a statutory maximum sentence of 20 years' imprisonment, in addition to the Section 924(c) offense, which carried a five-year consecutive sentence. He was subject to a sentence of 324 months' imprisonment under the Sentencing Guidelines for the first three offenses. The district court would therefore have been required to run his sentences for those offenses consecutively, in part, for a total sentence of 324 months' imprisonment (plus the consecutive 60 months' imprisonment under Section 924(c)).

Thus, regardless of the outcome in *Cotton*, neither petitioner would be entitled to a sentence lower than the one to which he is currently subject. There is no reason in these circumstances for the Court to hold the petition for disposition in light of *Cotton*.

2. Petitioners also contend (Pet. 18-22) that Felix Gallego's sentence was unlawful under *Apprendi* because the district court, rather than the jury, made the drug quantity determination that was used to calculate his sentencing range under the Sentencing Guidelines. As noted, the Court held in *Apprendi* that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Petitioners seek to extend that rule to facts that increase a defendant's Guidelines sentencing range, but not his statutory maximum sentence. The court of appeals correctly declined to do so. See Pet. App. 18.

This Court has upheld the use and operation of the Sentencing Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and has made clear that, so long as the statutory minimum and maximum sentences are observed, it is constitutionally permissible for the Guidelines to establish presumptive sentencing ranges on the basis of factual findings made by the sentencing court by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S. 511, 513, 514 (1998) (Guidelines "instruct *the judge* * * * to determine" the type and quantity of drugs for which a defendant is accountable "and then to impose a sentence that varies depending upon amount and kind"). *Apprendi* did not hold otherwise. See *Apprendi*, 530 U.S. at 497 n.21 ("The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held.") (citing *Edwards*, 523 U.S. at 515).

The Sentencing Guidelines simply "channel the sentencing discretion of the district courts and * * * make mandatory the consideration of factors" that

courts have always had discretion to consider in imposing a sentence up to the statutory maximum. *Witte* v. *United States*, 515 U.S. 389, 400-404 (1995); see *United States* v. *Watts*, 519 U.S. 148, 155-156 (1997) (per curiam). A district court retains the authority to "depart from the applicable Guideline range if 'the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *Koon* v. *United States*, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. 3553(b)). Because the Guidelines leave the sentencing court with significant discretion to impose a sentence within the statutory range, and because specific offense characteristics and sentencing adjustments under the Guidelines cannot increase the statutory maximum penalty for a criminal offense, *Apprendi* does not support a challenge to the constitutionality of the Guidelines. See Guidelines § 5G1.1; *Edwards*, 523 U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines").

The courts of appeals have consistently rejected efforts to apply *Apprendi* to findings under the Sentencing Guidelines. See, *e.g.*, *United States* v. *Baltas*, 236 F.3d 27, 40-41 (1st Cir.), cert. denied, 532 U.S. 1030 (2001); *United States* v. *Garcia*, 240 F.3d 180, 184 (2d Cir.), cert. denied, 121 S. Ct. 2615 (2001); *United States* v. *DeSumma*, 272 F.3d 176, 181 (3d Cir. 2001); *United States* v. *Kinter*, 235 F.3d 192, 198-202 (4th Cir. 2000), cert. denied, 532 U.S. 937 (2001); *United States* v. *Doggett*, 230 F.3d 160, 166 (5th Cir. 2000), cert. denied, 531 U.S. 1177 (2001); *United States* v. *Munoz*, 233 F.3d 410, 413-414 (6th Cir. 2000); *Hernandez* v. *United States*, 226 F.3d 839, 841-842 (7th Cir. 2000); *United*

States v. *Chavez*, 230 F.3d 1089, 1090 (8th Cir. 2000); *United States* v. *Hernandez-Guardado*, 228 F.3d 1017, 1024-1027 (9th Cir. 2000); *United States* v. *Heckard*, 238 F.3d 1222, 1235-1236 (10th Cir. 2001); *United States* v. *Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000), cert. denied, 122 S. Ct. 552 (2001); *In re Sealed Case*, 246 F.3d 696, 698-699 (D.C. Cir. 2001). Accordingly, the issue does not warrant the Court's review, particularly under the plain-error standard applicable in this case.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] In *Harris* v. *United States*, No. 00-10666, this Court granted review (Dec. 10, 2001) to decide whether brandishing a firearm, which results in an increased mandatory minimum sentence under 18 U.S.C. 924(c)(1)(A), must be charged in an indictment and proved beyond a reasonable doubt. The features of the Guidelines discussed in the text differentiate the constitutional question in *Harris* from any constitutional challenge to the Guidelines. This case therefore need not be held for *Harris*.